NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 02-97042
DAVID DREW HOWARD,	:	CHAPTER 7
Debtor.	:	JUDGE MASSEY
PLAYNATION PLAY SYSTEMS, INC.,	:	
Plaintiff,	:	
v.	:	ADVERSARY NO. 03-06101
DAVID DREW HOWARD,	:	
Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted the trial in this adversary proceeding on September 20 and 21, 2004. Based upon the evidence presented at trial, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, which replace those stated orally on the record at trial.

Defendant and Debtor David Howard transferred real property titled in his name to a friend less than three months prior to filing a petition initiating the above referenced Chapter 7 bankruptcy case. He denied making any transfer of property outside the ordinary course of business in his Statement of Financial Affairs filed with his petition. Plaintiff seeks the denial of

Defendant's discharge in connection with the transfer and failure to disclose it under 11 U.S.C. §§ 727(a)(2) and 727(a)(4), which provide:

> (a) The court shall grant the debtor a discharge, unless -
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> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;
>
> . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case -
>
> (A) made a false oath or account [.]

In 1999, Defendant David Howard owned a company called New Horizons Playsystems Inc., which was engaged in the business of selling play sets manufactured by Plaintiff. In the late summer of 1999, Playnation and New Horizon entered into a distributorship/dealer agreement pursuant to which New Horizons would sell products produced by Playnation in Texas. Attached to that agreement, admitted as Plaintiff's Exhibit 3, is an agreement of David Howard to guarantee the obligations of New Horizon to Playnation. David Howard and Playnation also entered into a lease agreement for property in Woodstock, Georgia on which Mr. Howard had been conducting the business of New Horizon. Mr. Howard did not own that property; he had leased it from the owner under an agreement giving him the right to purchase the property.

Within approximately two weeks after the execution of these agreements, Playnation found out that Mr. Howard was under investigation for trafficking in drugs and cancelled the deal. In the interim, Playnation shipped goods to New Horizon, which did not pay for those goods. In

November 1999, David Howard pled guilty to a charge of conspiracy to possess and distribute marijuana in the U.S. District Court for the Southern District of Mississippi and thereafter served time in prison. In late 1999, Playnation sued David Howard in the State Court of Cobb County, Georgia on his guaranty of New Horizons' debt to Playnation.

David Howard testified that his wife had two bank accounts, one in the name of Fun Inflatables and the other, he thought, was in the name of Bouncy Bear Moonwalks. He recalled that the Fun Inflatables account was closed in August or September of 2001. He had signature rights on that account. Although Mr. Howard claimed that the sole proprietorship known as Fun Inflatables belonged to his wife, he in fact signed a majority of the checks, and particularly those related to running that business, between July 26, 2001 to October 29, 2001, as reflected in Plaintiff's Exhibit 56.

Plaintiff called Robert Abelson, an accountant, as a witness. Mr. Abelson testified that on December 27, 2001, he met with David Howard and with an individual named Chris Sands concerning financial problems with Mr. Sands' business called Play 4 Fun. He stated that David Howard was the manager of Chris Sands' business. Abelson testified that Sands and Howard "had obviously had conversations about David being able to keep his job since there weren't any working capital funds available." He further testified that David Howard inquired about forming a corporation to be owned by David Howard's brother, Donald Howard.

Abelson further testified that David Howard and Sands returned to his office on the following day and that David Howard provided him with information to enable him to prepare papers for creating a new corporation to be owned by Donald Howard. David Howard testified that it was his brother's idea to form the corporation.

Abelson stated that David Howard told him about some tax liabilities against him and mentioned other liabilities without any details during their December 2001 meetings. He said that he talked by telephone with Donald Howard that day concerning the creation of the corporation. Defendant expressed to Abelson concern about losing his job.

In early 2002, Abelson filed documents with the Georgia Secretary of State to incorporate a company known as Fun Inflatables, Inc. ("FII") effective as of January 10, 2002. The name, according to David Howard, was a d/b/a of Bouncy Bear Moonwalks; he further stated that his brother decided to use that name, Defendant's wife having ceased using it in connection with what he contended was her business.

Mr. Abelson also attended to filing a form SS-4 with the Internal Revenue Service and a form 2553 electing to be treated as an S corporation. All of the corporate and tax documents executed in the name of Donald Howard were in fact signed by either David Howard or by Abelson. Nonetheless, the evidence shows that Donald Howard ratified those actions.

Mr. Abelson obtained a corporate minute book for FII, which he kept. No one prepared organizational or other minutes or consents of the sole shareholder. The minute book, marked as Plaintiff's Exhibit 26, was unused. A copy of a share certificate, marked as Defendant's Exhibit 6, showed the issuance of 500 shares of common stock of FII to Donald Howard. The certificate was apparently signed by Donald Howard and is dated January 10, 2002. The par value of the stock shown on the share certificate is $1.00. Donald Howard testified that he paid $1,500 to FII as capital. Donald Howard also guaranteed a loan made to FII by a company called Kapton, Inc. in the amount of $10,000.

On January 4, 2002, David Howard attended a hearing on Playnation's motion for summary judgment in the State Court of Cobb County. On January 16, 2002, the State Court of Cobb County, Georgia entered a judgment for $113,637.01 against Howard and in favor of Playnation.

David Howard testified that he later lost his job with Play 4 Fun and that he thought that occurred in March 2002. FII commenced operations in February or March 2002 and was in the business of renting inflatable "moonwalks" for entertaining children. David Howard ran that business with little or no supervision from his brother and was FII's only employee.

Donald Howard testified that he formed FII as a means of making money to supplement his regular income, but he could recall few details about the operations of FII and had very little involvement in its business. His testimony that his purpose was to make additional money is belied by his lack of interest or involvement in the operations and financial performance of FII.

The Court infers from the forgoing facts that the purpose underlying Donald Howard's investment in and ownership of FII was not, as he testified, to make some additional money, but rather was a reaction to the judgment obtained by Playnation against David Howard. The Court infers that even if there had been some chance that Donald Howard could have made money, the primary purpose of setting him up as the owner of the business was to give David Howard a place to work that he did not own so as to limit the ability of Plaintiff and other creditors to seize assets that could have been placed in a company owned by him.

On April 23, 2002, Defendant transferred by warranty deed an unimproved lake-view lot located in Hancock County, Georgia to Gwen Hammer. The warranty deed was recorded in the real estate records of Hancock County on April 30, 2002. On July 11, 2002, Defendant filed his

petition initiating this Chapter 7 case. With the petition he filed a statement of financial affairs of which the Court takes judicial notice. Mr. Howard executed his Statement of Financial Affairs below this statement: "I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." Question 10 on the Statement of Financial Affairs required Mr. Howard to "List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case." Mr. Howard answered that question "None."

On the first day of trial, David Howard testified that he sold the Hancock County lot to Ms. Hammer in April 2001. When Mr. Howard was asked "when was title to the property actually transferred to Gwen Hammer?", he responded: "Sometime in 2002." According to him, she agreed to pay him $6,000 for the lot and paid him the first $3,000.00 in April 2001. They had no written contract. Mr. Howard initially testified that she paid the balance of the purchase price in early 2002. When confronted with his earlier testimony at an examination under Bankruptcy Rule 2004 that he received the balance of $3,000 within one week of April 23, 2002, he changed his testimony and stated that he received $3,000 from Ms. Hammer within a week of April 23, 2002.

> Q: Well just, you got cash for the property, you got $3,000 cash. How close was that relative to the time you signed over the property, the actual deed?
> A: The second 3000?
> Q: Yes sir.
> A: Probably relatively close
> Q: Within like a few hours, days, weeks?
> A: Within a week I would say, a week.
> Q: Within a week? Ok. So within a week of April 23rd...
> A: Yes sir.

When confronted with the omission of any mention of the transfer in his schedules, Mr. Howard responded, "I hand wrote it on the application I was asked to fill out. It wasn't my decision to leave it out of there. . . . I had written it on a schedule. We [he and his attorney] discussed it, I read it over, actually we went to a hearing. I asked him why it wasn't there, and he explained to me that it was because the original transaction had taken place a year before."

On September 21, 2002, Defendant's counsel called Gwen Hammer as a witness and elicited the following testimony.

> Q: In 2001 you said you got a piece of property from David Howard. Would you describe what transpired in 2001?
> A: I ju...I found out that Dave was selling the property. I paid him $6,000 for the property.
> Q: When did you pay him $6,000?
> A: In 2001.
> Q: Did you pay the entire $6,000 at that point in time?
> A: Yes.

Ms. Hammer further gave the following testimony:

> Q: Did you receive a deed to the property?
> A: Not at that time.
> Q: When did you receive the deed?
> A: I think it was about a year after.
> Q: Why was it so much later? Or, why did you receive it at that point in time?
> A: I just never, I didn't do anything with it that year that we purchased it.
> Q: Why would you not have entered into a contract or other writing with David with regards to the property?
> A: I just had known Dave so long I didn't think that that was necessary.
> Q: Before you gave David the $6,000 for the piece of property, did you ascertain the value of the property that you were buying?
> A: Um, I just figured it was worth about the $6,000 he was asking for it.
> Q: And how did you figure that, how did you come to that conclusion?
> A: Just word of mouth, really. I mean, David told me that's approximately what the property was worth. I didn't look into it.

On cross-examination, Ms. Hammer testified that she had known Defendant since 1995 and that her boyfriend, Glen Williams, had been a partner of Defendant in a venture. She testified that Mr. Williams and Mr. Howard were on still on good terms. With respect to the method and source of payment, Ms. Hammer gave the following testimony:

Q: How did he pay you for that property?
A: I paid him for the property.
Q: I'm sorry. I've been up late. How did you pay him for the property?
A: Cash.
Q: And where did you get the cash from?
A: Borrowed it.
Q: From whom?
A: My parents.
Q: Alright. And why did you pay cash as opposed to a check?
A: I don't know. I didn't even think about writing a check.
Q: $6,000 cash?
A: Mm-Hmm.
Q: Alright. So you went to your bank to collect the 6000 or you went to your parents?
A: My parents.
Q: Did they give you a check that you cashed?
A: No, they gave me cash.
Q: Your parent's gave you cash. Do you know where they got the cash from?
A: No.
Q: Alright. Now, on what day...of what day did you give David Howard $6,000 cash?
A: I don't remember the exact date. It was just in April.
Q: Of what year?
A: 2001.
Q: April of 2001?
A: Yes.
Q: Why do you know it was April of 2001?
A: I just remember that was the year we did the transaction.

Ms. Hammer was then asked to describe the details of the transaction and testified that she gave Defendant $6,000 in an attorney's office in Hancock County:

Q: And you met in an attorney's office in Hancock County to exchange $6,000?
A: Yes.
Q: Ok. Did you...did David sign the deed over to you to that property in April of 2001?
A: No.

Q: Why not.
A: I don't know. It was like a year later when we did the transaction at the attorney's office for the deed.
Q: Did you get a receipt for the cash that was...that you gave to David?
A: No.

Plaintiff's counsel then showed Ms. Hammer her affidavit previously filed in this adversary proceeding in which she swore that she paid the Defendant $3,000 in April 2001 and an additional $3,000 in February 2002. After reviewing her affidavit and being asked if that refreshed her memory, Ms. Hammer testified that she did not "remember much about the deal at all it's been so long." After further questioning, she then remembered that " I had given Dave 3,000 down, and paid him the balance...I didn't give him the whole $6,000 at one time." When counsel referred to her earlier testimony of having received $6,000 from her parents, she stated, "But I didn't give...but didn't give Dave the $6,000 total." She then testified that she had no reason to think she was mistaken in stating that she had paid $3,000 to Defendant in February 2002.

When asked where she made the second payment, she stated that she traveled an hour and a half to get to the property to pay Defendant $3,000, but she acknowledged that she lived in Woodstock, Georgia and believed that David Howard resided in the Atlanta area. She then testified that she had made three trips to Hancock County, first in April of 2001 to pay Howard $3,000, second in February, 2002 to pay him an additional $3,000 and third, on April 23, 2002 to attend a meeting in attorney's office so that David Howard could sign the deed.

Finally, Plaintiff's counsel grilled her one last time about the timing of the alleged payments, and she gave this testimony:

Q: Alright. Is it at all possible that you in fact paid Dave Howard $3,000 dollars within one week, in other words, in April of 2002?
A: I don't remember sir.
Q: So its...
A: I don't remember the time frames.
Q: You paid him 3,000 in April of 01, in your affidavit you paid him another 3000 in February of 02. According to your affidavit, your sworn affidavit. My question is, is it possible you may be incorrect about February of 2002? Is it possible that you actually paid Dave Howard within a week of April 23rd, 2002?
A: I don't think it was within a week. I just really don't remember.
Q: So the February 2002, its possible it wasn't February of 2002 now?
A: I don't remember sir.

On redirect, Mr. Howard's attorney asked Ms. Hammer whether she wrote the words, ""I Gwen Hammer paid the property tax on said property for the year 2001"on her affidavit marked as Defendant's Exhibit 23. She stated that she did, but she was unable to produce any evidence of whether or when she paid these taxes.

Mr. Howard was then called to the stand for further cross-examination and gave this testimony:

Q: Mr. Howard you testified yesterday, under oath, that you got that second $3,000 payment from Ms. Hammer within a week of your signing the deed to the Hancock parcel, correct?
A: I said I could not remember, that that was approximately right.

In fact, Mr. Howard had testified that he could not "remember exactly" when he received the second $3,000 from Ms. Hammer, but when asked how close was the time he received $3,000 to the execution of the deed, he said, "Probably relatively close" and then said, "within a week I would say, a week."

Mr. Howard then testified that in April 2001, he and Ms. Hammer went to the courthouse in Hancock County to attempt to find a deed on the property and "looked through the books for

several hours, could not find it." He stated that they then "walked across the street to a...the attorney, which they retained to find the deed." He then gave this testimony:

> Q: This was in April of 2001?
> A: No, I'm sorry. April of 2001 we went out the first time. They gave me the 3000.
> Q: In cash.
> A: Yes.
> Q: And you were at the property.
> A: Right.
> Q: Ok.
> A: I went back home, looked for the deed, never could locate it. My wife had most of our documents. I asked her about it, she could not find it, either. So when we went back in February of 2002, they paid me the rest of the money. We went to the courthouse to try to find the deed. We couldn't find it.

The Court presumes that the deed Mr. Howard referred to was the one he had received when he purchased the property in 1995. There is no evidence that Mr. Howard gave Ms. Hammer a deed of any kind prior to April 23, 2002.

Finally, Mr. Howard testified that it was in February 2002 that he and Ms. Hammer went to the courthouse to attempt to locate a deed. He stated that they went to the property on a weekday and when asked if he then received $3,000, he testified:

> A: Well, correct. And we drove to Sparta, downtown to the courthouse, tried to locate the deed, looked for several hours. Again, it wasn't computerized. It was big older books. We could not find the deed, so we asked one of the ladies at the courthouse if there was an attorney around. She pointed us out to an attorney across the street, and we went across the street. And at that time, that's when they discussed, doing, he, finding the deed for us.

But he did not recall meeting with the attorney in Sparta in April 2002; he said, "I thought they mailed the stuff back up."

In his affidavit filed last year in this adversary proceeding, David Howard stated that "[t]itle did not transfer to Gwen at that time [April 2001] because a title search had not been completed and because we could not locate the deed describing the property." Plaintiff's

Exhibit 24, ¶ 4. Gwen Hammer stated in her affidavit filed last year in this adversary proceeding that "[t]itle did not transfer to me at that time [April 2001] because a title search had not been completed and because we could not locate the deed describing the property." Plaintiff's Exhibit 23, ¶ 4.

The testimony of David Howard concerning the Hancock County lot was not credible. The testimony of Gwen Hammer concerning the Hancock County lot was not credible. When pressed on salient facts about the story of the sale of the lot, they frequently had lapses of memory and then miraculously were able to recall details of several different versions of what happened. They met three times in Hancock County or was it twice? The deed transferring the property was signed in the lawyer's office, or was it mailed? They met with the lawyer three times, or was it twice or only once? The payment of $6,000 occurred in April 2001, or was it $3,000 then and $3,000 within a week of April 23, 2002, or was it $3,000 in February 2002?

Each contradicted his or her own prior sworn statements and testimony at the trial; each contradicted the other. The Court finds that there is no credible evidence that Gwen Hammer paid David Howard anything in exchange for the warranty deed to the Hancock County lot.

A discharge furthers the fresh start policy, and hence section 727 is strictly construed against those objecting to discharge. *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1342 (9th Cir. 1986). The burden of proving facts that support denial of a discharge is by a preponderance of the evidence. *Holland v. Sausser (In re Sausser)*, 159 B.R. 352, 355 (Bankr. M.D. Fla. 1993) (citing *Grogan v. Garner*, 498 U.S. 279, 11 S. Ct. 654, 112 L. Ed. 2d 755 (1991)) (burden of proof under 11 U.S.C. § 523(a)(2) dealing with the dischargeability of a debt

arising from fraud is by a preponderance of the evidence). The burden of proof rests on the plaintiff. Fed. R. Bankr. P. 4005.

A debtor found to have committed one of the acts specified in section 727 of the Bankruptcy Code is not entitled to a discharge, for only the honest debtor is entitled to a discharge. *Grogan*, 498 U.S. at 286-87 (the opportunity for a fresh start is limited to the honest but unfortunate debtor).

> [I]n order for a debtor to be denied a discharge under § 727(a)(2), an objector must show by a preponderance of the evidence that (1) the debtor transferred, removed, destroyed, mutilated, or concealed (2) his or her property (or the property of the estate if the transfer occurs post-petition) (3) within one year of the petition filing date (for prepetition transfers) (4) with intent to hinder, delay or defraud a creditor. *R.I. Depositors Economic Protection Corp. v. Hayes (In re Hayes)*, 229 B.R. 253, 259 (B.A.P. 1st Cir. 1999). Grounds for discharge are construed liberally in favor of the debtor. *See Commerce Bank & Trust Co. v. Burgess (In re Burgess)*, 955 F.2d 134, 137 (1st Cir. 1992).

In re Watman, 301 F.3d 3, 7 (1st Cir. 2002).

There is no dispute that Defendant owned the Hancock County lot and transferred it to Gwen Hammer within one year of the petition filing date. There is ample evidence that Defendant made the transfer with actual intent to hinder, delay or defraud his creditors.

> The intent element in section 727(a)(2)(A) is actual intent, rather than constructive intent. *Future Time, Inc. v. Yates,* 26 B.R. 1006, 1007 (M.D. Ga.), *aff'd,* 712 F.2d 1417 (11th Cir. 1983). However, because the debtor is unlikely to admit his fraudulent intent, actual intent may be inferred from the actions of the debtor using circumstantial evidence. *Id.* at 1007-08. Factors which might evidence actual intent to defraud, often referred to as the "Badges of Fraud," include:
> (1) the lack or inadequacy of consideration;
> (2) the family, friendship or close associate relationship between the parties;
> (3) the retention of possession, benefit or use of the property in question;
> (4) the financial condition of the party sought to be charged both before and after the transaction in question;
> (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of

> suits by creditors; and
> (6) the general chronology of the events and transactions under inquiry.
> *Pavy v. Chastant (In re Chastant),* 873 F.2d 89, 91 (5th Cir. 1989); *Harris v. Burrell (In re Burrell),* 159 B.R. 365, 372 (Bankr. M.D. Ga. 1993).

In re Cutts, 233 B.R. 563, 570 (Bankr. M.D. Ga. 1999).

Several of those factual patterns exist in this case. First, because there is no credible evidence that Gwen Hammer paid Defendant any amount of money for the Hancock County lot, there is no evidence that he received any consideration for the transfer. There was a close friendship between Defendant and Gwen Hammer and her boyfriend. There is no credible evidence that anyone used the lot after April 2001. The financial condition of Mr. Howard decreased by the value of the lot after the transfer to Gwen Hammer. There is no credible evidence in the record to establish the value of the lot.

David Howard's course of conduct in 2001 and 2002 and the chronology of relevant events support an inference of fraudulent intent. David Howard had owned his own business and had been in partnership with Ms. Hammer's boyfriend prior to his criminal troubles. After being sued by Playnation, he avoided being the owner of a business. Defendant's wife opened a bank account in the name of Fun Inflatables, but David Howard signed the majority of checks on the Fun Inflatables account from July to October 2001 shown in Plaintiff's Exhibit 56 and most of the ones that plainly related to the business. Regardless of who actually owned the sole proprietorship called "Fun Inflatables," David Howard was heavily involved in that business.

The same pattern is evidence by the creation of FII. Although there was nothing inherently wrong with David Howard working for his wife or for his brother, these business structures were plainly designed to put David Howard under Plantitff's radar screen as much as

possible. The effort to make himself more judgment proof than if he had owned the sole proprietorship or FII shows a motive reflected in the transfer of the Hancock County lot: to not have visible assets in his name that creditors could easily seize.

There is another badge of fraud. He failed to disclose the transfer of the Hancock County lot in response to question 10 of this statement of financial affairs. His defense to that failure is primarily that he disclosed the transfer to his attorney in work papers he completed at the attorney's request. Defendant offered those work papers in evidence as Defendant's Exhibit 34. Page 19 of that exhibit shows Defendant's handwritten answers to question 10 on the official form of the statement of financial affairs. A copy of that page is attached to this Order as Attachment A.

Mr. Howard's notes show that he clearly understood that he had transferred the lot two months prior to filing bankruptcy, and his affidavit and testimony show that he clearly understood that he had to deliver the deed to Ms. Hammer to transfer title to that property. The last notations consisting of the word "deed" after the words "early May, 2002" and the words "sold 4/01" appear to have made with a different pen than the one used for the earlier notes. Based on Mr. Howard's testimony that it was not his "choice" to not disclose the transfer, it is likely that the bolded words "deed" and "sold 4/01" were added after he had submitted the work papers to his attorney.

If by that testimony, Mr. Howard was attempting to signal that he relied on his attorney in giving a false answer, "[t]he defense of reliance on counsel is not available when it is transparently plain that the advice is improper. *In re Mascolo,* 505 F.2d 274, 277 n.4 (1st Cir. 1974); *In re Nazarian,* 18 B.R. 143, 147 (Bankr. D. Md. 1982)."; *In re Kelly* 135 B.R. 459, 462

(Bankr. S.D.N.Y. 1992). Here it is transparently plain that advice, if any, given to Mr. Howard not to disclose the transfer of the lot would have been totally improper.

Until Mr. Howard delivered a deed to the lot to Ms. Hammer, she had no interest in the lot. This is the point made in the affidavits of David Howard and Gwen Hammer that "title did not transfer" until the deed was executed and delivered. David Howard understood this by listing the transaction in the first place in his work papers. David Howard has never amended his statement of financial affairs to correct his answer to question 10, even though he claims to have disclosed the transfer to the trustee at the meeting of creditors, a fact that he did not prove. These facts give rise to the inference that Defendant intended to effect and conceal the transfer of the Hancock County lot in order to hinder, delay or defraud his creditors.

Reckless disregard for the truth also suffices to infer fraudulent intent. *See In re Miller,* 39 F.3d 301, 305 (11th Cir. 1994). Mr. Howard swore in his verified complaint initiating his divorce proceeding filed in Cobb County, Georgia on July 10, 2002 that his annual income was $52,000.00. In Schedule I, of which the Court takes notice in this adversary proceeding, he certified under penalty of perjury that his income was $1,733.33 per month. Mr. Howard testified that the divorce complaint had been prepared at an earlier date based on his anticipated income at Play 4 Fun, but he signed the verification on July 10, 2002, when he had not worked for Play 4 Fun for several months. The divorce complaint and Schedule I cannot both be correct, showing that Mr. Howard is reckless when it comes to the truth. His testimony at trial, particularly in light of the testimony of his friend, Gwen Hammer, dramatically demonstrates his reckless indifference to the truth.

The second basis for denial of Defendant's discharge is contained is section 727(a)(4) of the Bankruptcy Code, which provides for denial of a discharge of a debtor who knowingly and fraudulently makes a false oath in connection with the bankruptcy case. To run afoul of this section, "the debtor must have made a statement under oath which he knew to be false, and he must have made the statement willfully, with intent to defraud." *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir. 1987); *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1983). The plaintiff must prove actual and not constructive fraud. *Rogers v. Aiello (In re Aiello)*, 173 B.R. 254, 257 (Bankr. D. Conn. 1994); *cf. Wines v. Wines (In re Wines)*, 997 F.2d 852, 856 (11th Cir. 1993). A misstatement that is the result of mistake or inadvertence may not be the ground for denial of discharge. *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). Moreover, the false oath must concern a material misstatement or omission. *Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991) (per curiam). "The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of property." *Chalik*, 748 F.2d at 618. A debtor may not defend by claiming that an asset is worthless. *Id*.

"Fraudulent intent of course may be established by circumstantial evidence, or by inferences drawn from a course of conduct." *Farmers Coop. Ass'n v. Strunk*, 671 F.2d 391, 395 (10th Cir. 1982); *Ingersoll v. Kriseman (In re Ingersoll)*, 124 B.R. 116, 123 (M.D. Fla. 1991). "[R]eckless indifference to the truth" is the functional equivalent of fraud. *Diorio v. Kreisler-Borg Const. Co. (In re Diorio)*, 407 F.2d 1330, 1331 (2d Cir. 1969) (per curiam) ("Statements called for in the schedules ... must be regarded as serious business; reckless indifference to the

truth ... is the equivalent of fraud"). A debtor's failure to amend schedules to list an omitted asset after that omission comes to light evidences a reckless indifference to the truth sufficient to support a finding of fraud. *Beaubouef*, 966 F.2d at 178.

All the factual elements necessary to deny Defendant's discharge under section 727(a)(2) are present here. Defendant made a statement under oath in response to question 10 on his statement of financial affairs. He falsely stated that he did not transfer any property outside the ordinary course of business during the one year period preceding the filing of the petition. He knew that statement to be false because he listed the transfer on the work papers provided to him by his bankruptcy attorney. Mr. Howard made the statement with fraudulent intent based on the same inferences drawn from his course of conduct and motive discussed above to make and conceal the transfer in order to hinder, delay or defraud his creditors. His false statement is concerning a valuable asset is obviously material to the case.

Based on these findings of fact and conclusions of law, Plaintiff is entitled to a judgment denying the discharge of Defendant and Debtor David Howard.

IT IS SO ORDERDED.

This 24th day of September 2004.

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JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE